(7) (4)

Nos. 91-790 and 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

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Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES

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June 10, 1992

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In its brief as *amicus curiae*, the United States recommends that the Court grant the petition (No. 91-790) because the question presented there is one "of substantial importance" that "recurs . . . frequently" and has divided

the circuits. U.S. Br. 8. Petitioner obviously agrees with that conclusion.

The United States also recommends, however, that this Court should grant the cross-petition (No. 91-1206). The government acknowledges that the cross-petition "is not ripe for review in its own right" because the decision below "is the first federal appellate treatment of the issue." *Id.* at 12, 13. Nevertheless, because the cross-petition involves "the same statutory scheme" yet has regulations that "differ significantly" from those at issue in the petition, the government concludes that this Court should grant the cross-petition now in order to "provide substantially greater guidance to the lower courts." *Id.* at 12-13.

As discussed below, the very reasons that the government offers in favor of granting the petition counsel against review of the cross-petition at this time. The better course, petitioner submits, would be for the Court simply to hold the cross-petition pending its review of the petition.

As the government's brief demonstrates, the petition raises a substantial and difficult legal issue that will require careful analysis by the parties, *amici*, and this Court. "Several federal statutes . . . bear on the analysis, as do regulations promulgated by two components of the Department of Transportation." *Id.* at 2. The "four courts of appeals that have addressed" the issue "have adopted no fewer than four separate approaches" (*id.* at 8), and the analysis below also conflicts with the analysis of another circuit in an analogous preemption case. *Id.* at 9 n.5. Perhaps most telling, the United States has not yet been able to reach a view on the merits of the petition, finding it "a matter of considerable complexity and difficulty." *Id.* at 15.

Given the complexity and importance of the petition, petitioner submits that the preferable course is for the

Court to focus its review, at least for now, exclusively on the petition. The presentation of the issues relevant to the petition will necessarily be truncated if the parties and the Court must simultaneously consider the issues raised by the differing regulations applicable to the cross-petition. Moreover, effective consideration of the cross-petition may also be compromised by joint review. As the government's brief explains, resolution of the cross-petition may turn on issues largely unrelated to the petition that have not yet been considered by any appellate court, including the court below. *Id.* at 12 & n. 8 (noting that lower courts' analysis of cross-petition issue as it relates to municipal regulation of train speed as opposed to tort liability "is cast into some doubt by this Court's decision in *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476 (1991)").

Against these disadvantages, the advantage of granting immediate review seems modest at best. There is no pressing need for guidance on the excessive train-speed question because this is the first federal appellate decision on that question. And it is unclear, at least at this stage, whether resolving the question of railroad speed preemption will be helpful in preemption cases addressing state regulation of other aspects of railway activity. Questions concerning the preemptive scope of federal railway and highway safety legislation and regulations arise in many different contexts and implicate a variety of regulations. At the end of April, for example, this Court invited the United States to express its views on another petition raising railway safety preemption questions in yet another factual context—the preemption of state walkway requirements. See *Railroad Comm'n of Texas* v. *Missouri Pac. R.R.*, No. 91-1423, petition for cert. pending. The very fact that that case almost certainly will be held pending the disposition of the grade crossing issue means that there will be some issues left open concerning Section 434 no matter how many cases are considered now. Accordingly holding the "unripe" petition seems particularly prudent.

The Court should not attempt now to determine the desirability of addressing all the various permutations of railway safety preemption. Instead, the Court should defer its decision on the cross-petition until after it has resolved the petition, when the Court will be in a better position to judge the need, if any, for providing additional guidance.

CONCLUSION

For these reasons and those stated in the petition and opposition to the cross-petition, the petition in No. 91-790 should be granted and the cross-petition (No. 91-1206) should either be denied or be held pending a decision in No. 91-790.

Respectfully submitted,

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